No. 79-695



# In the Supreme Court of the United States

OCTOBER TERM, 1979

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LILLIAN H. BOSCH, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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The question presented in this federal income tax case is whether a state court decree awarding petitioner a "special equity" in certain property constituted a division of property between co-owners, or a disposition to her of her husband's property in satisfaction of her marital rights. If, as the court of appeals held, the transaction was a division of property, petitioner's basis in that property consists of her cash investment. On the other hand, if, as petitioner contends, the property was transferred to her in exchange for her marital rights, her basis in the property would be its fair market value as of the date of the decree.

The pertinent facts are undisputed and may be summarized as follows: During her marriage, petitioner advanced $115,144.50 of her own funds to her husband for use in improving approximately 3,500 acres of land,

title to which was in her husband's name. Petitioner and her husband were thereafter divorced. On the basis of her financial contribution, a Florida divorce court held that petitioner had a "special equity" in the improved land, and awarded her a one-third interest (Pet. 24-25; A. 36).[1] The land was eventually partitioned, and petitioner sold portions of it during 1966 (A. 58-59).

On audit, the Commissioner of Internal Revenue determined that petitioner's basis in the sold property was equal to her cash investment and determined deficiencies accordingly. In this refund suit brought by petitioner in the United States District Court for the middle District of Florida, the district court held that petitioner had received the property in exchange for her marital rights, and that her basis in the property sold was equal to its fair market value on the date of partition[2] (Pet. 28). The court of appeals reversed. It ruled that the award of "special equity" constituted a division of property between co-owners, and was not a taxable event creating a new basis in her share of the property (Pet. 22).

1. The court of appeals correctly held that petitioner's basis in the property was her cash investment in it rather than its fair market value on the date of partition. In *United States* v. *Davis*, 370 U.S. 65 (1962), this Court held that the federal tax consequence of the transfer of property incident to a divorce turns on the nature of the recipient spouse's interest in the property under state law. If the settlement is a division of property between

[1]"A." refers to the record appendix filed in the court of appeals.

[2]Petitioner conceded on appeal that even under her theory, the date for determining fair market value should have been the date of the divorce decree, rather than the date of partition, as determined by the district court (see Pet. 19 & n.2).



co-owners, it is not a taxable event to the transferor spouse and does not affect the basis of the transferee spouse. If, however, the settlement is a distribution of property in exchange for the release of marital rights by the transferee spouse as in *Davis*, the transfer is a taxable transaction requiring the transferor to recognize gain or loss and resulting in the transferee's having a basis in the property equal to the fair market value of the property.

Petitioner challenges the court of appeals' ruling that her "special equity" was a vested property interest under Florida law so that the divorce court's award of a one-third interest in the land constituted a division of property between co-owners, rather than a distribution to petitioner in exchange for her marital rights. But this Court sits to decide questions of federal, rather than state, law and, indeed, will not disturb an interpretation of state law by a court of appeals unless it is convinced that it is clearly erroneous or unreasonable. *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *Helvering* v. *Stuart*, 317 U.S. 154 (1942).

Here, the court of appeals' interpretation of Florida law is completely in accord with the precedents of the Florida Supreme Court. In its decision, the court of appeals undertook an extensive analysis of Florida case law to determine the nature of petitioner's "special equity." The court noted (Pet. 20-22) that this doctrine developed during the years when the wife's property automatically became her husband's upon marriage, and when, in the event of a divorce in which she was the guilty party, she forfeited any right to alimony. Although the wife receives nothing for her marital rights in such a case her "special equity" cannot be forfeited. Thus, for

example, in *Heath* v. *Heath*, 103 Fla. 1071, 1074-1075, 138 So. 796, 797 (1932), the Florida Supreme Court awarded "special equity" to an adulterous wife, even though a Florida statute (Fla. Comp. Laws 1914, § 1932) specifically prohibited alimony. The court held that a wife's "special equities" are "already vested equitable property rights" that the wife had acquired during coverture. While she had forfeited her marital rights by misconduct, she had not forfeited her vested property rights. See also *Eakin* v. *Eakin*, 99 So. 2d 854 (Fla. 1958); *Engebretsen* v. *Engebresten*, 151 Fla. 372, 11 So. 2d 322 (1942).

As the court of appeals correctly concluded (Pet. 20-22), the distinction between "special equity" and ordinary marital rights is well established in Florida law. Unlike marital rights, "special equity" is recognized only when the contributions of the spouse in property or services are above and beyond the performance of ordinary marital duties. *Buckalew* v. *Buckalew*, 115 So. 2d 564 (Fla. Dist. Ct. App. 1959); *Steinhauer* v. *Steinhauer*, 252 So. 2d 825 (Fla. Dist. Ct. App. 1971); *Tanner* v. *Tanner*, 194 So. 2d 702 (Fla. Dist. Ct. App. 1967). The performance of spousal duties, even if arduous, or occasional help in the family business, will not suffice to give rise to "special equity." *Roberts* v. *Roberts*, 101 So. 2d 884 (Fla. Dist. Ct. App. 1958). The recognition of "special equity" is similar to the imposition of a constructive trust on the spouse's property, and accordingly must be proved by clear and convincing evidence sufficient to remove any reasonable doubt as to the other spouse's interest. See *Hoke* v. *Hoke*, 202 So. 2d 118 (Fla. Dist. Ct. App. 1967); *Lindley* v. *Lindley*, 84 So. 2d 17 (Fla. 1955); *Tanner* v. *Tanner*, *supra*. Furthermore, "special equity" is awarded according to the value of the property or services contributed, not according to the



financial needs and abilities of the parties. *Windham* v. *Windham*, 144 Fla. 563, 198 So. 202 (1940); *Wood* v. *Wood*, 104 So. 2d 879 (Fla. Dist. Ct. App. 1958).

Thus, a "special equity" under Florida law is entirely different from the property settlement at issue in *Davis*, where the reasonableness of the settlement was measured by such criteria as "the wife's financial condition, her needs in relation to her accustomed station in life, her age and health, the number of children and their ages, and the earning capacity of the husband" (370 U.S. at 70). Here, petitioner's property interest was measured only by the extent of her monetary investment in the development of the property, such monies having been her separate property. The divorce court's award allowed her to recover her appreciated investment. It was not an award in exchange for marital rights. Accordingly, the court of appeals correctly held (Pet. 22) that petitioner's award of "special equity" was a division of existing property interests.

2. Petitioner argues (Pet. 8-11) that the decisions of the Florida Supreme Court in *Carlton* v. *Carlton*, 78 Fla. 252, 83 So. 87 (1919), and 87 Fla. 460, 100 So. 745 (1924), require the conclusion that "special equities" are marital rights. The divorce decree in *Carlton*, however, did not involve a property settlement. See *Vance* v. *Vance*, 143 Fla. 513, 197 So. 128 (1940). All *Carlton* held was that in determining the proper amount of alimony, the divorce court could look to all the facts and circumstances, including the wife's contributions of services and property. Although these are the first Florida decisions to mention "special equity," they do not stand for the proposition that "special equity" is relevant only to awards of alimony. As the later Florida decisions make clear, "special equity" can also give rise

to a vested property interest, and may be awarded when alimony is prohibited by law. See, *e.g.*, *Heath* v. *Heath*, *supra*. Here, the divorce court awarded a one-third interest in the property to petitioner in recognition of her $115,000 investment in improving that property. That award was clearly not in the nature of alimony.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

DECEMBER 1979

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[3]Contrary to petitioner's argument (Pet. 15-16), Rev. Rul. 74-347, 1974-2 Cum. Bull. 26, is not inconsistent with the decision below. That ruling is predicated on the fact that neither husband nor wife brought any significant amount of property into the marriage, and they did not acquire any separate property by gift or inheritance. On those facts, only their jointly owned property was within the scope of the term "co-ownership." The ruling's reference to other situations that could give rise to co-ownership (*i.e.*, community property laws or laws equivalent thereto) does not preclude a finding of co-ownership under Florida law on the facts presented here.